

14 April 1981

MEMORANDUM FOR: Legislative Counsel
Special Support Assistant, DDA
Director, Office of Information Services, DDA
Information Handling Systems Architect, DDA
Chief, Information Management Staff, DDO
Records Management Office, NFAC
Chief of Support, DDS&T
Director, Office of Data Processing

FROM:

Office of General Counsel

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SUBJECT:

Draft Opinion for Comments:
Analysis of the Paperwork Reduction
Act of 1980

Attached please find a copy of a draft opinion prepared by this Office in the captioned matter. I would appreciate receiving your written comments on the draft, if any, no later than 28 April 1981. If you have any questions, please call me.

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Attachment

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FROM: Daniel B. Silver
General Counsel

SUBJECT: Analysis of the Paperwork Reduction Act of 1980

1. This memorandum is to advise you concerning the effects of the Paperwork Reduction Act of 1980, Pub.L. No. 96-511, upon the Agency and those portions of its operations which fall within the jurisdiction of your Office. In order that the specific effects might be more easily determined, I ask that you direct your attention to the request for information made in Part V below.

I. INTRODUCTION

The Paperwork Reduction Act amends Title 44 of the United States Code by adding a new Chapter, Chapter 35. Section 3504 of the Act (Authority and functions of the Director) vests the Director, Office of Management and Budget (OMB), with certain powers vis a vis the various federal agencies in the areas of: information policy, subsection (b); information collection, subsection (c); statistical policy, subsection (d); records management, subsection (e); privacy, subsection (f); automatic data processing and telecommunications, subsection (g); and other miscellaneous related duties. Section 3506 of the Act (Federal agency responsibilities) imposes reciprocal duties upon the various federal agencies: compliance with policies, principles, standards and guidelines prescribed by the Director, OMB, subsection (a); designation of senior agency official responsible for compliance, subsection (b); inventory of information systems and review of information management activities, subsection (c)(1); avoidance of system overlap, subsection (c)(2); assessment of paperwork burden of proposed legislation, subsection (c)(3); and assignment of Brooks Act delegation to agency official designated in subsection (b).

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The Agency fits within the definition of "agency" as contained in Section 3502(1). Hence, as a general rule, it falls within the provisions of the Act. Accordingly, it is required to assume the duties placed upon federal agencies by Section 3506 and to comply with exercises of authority by the Director, OMB, under Section 3504.

The main purpose of the Act, however, is to insert the Director, OMB, into the process whereby federal agencies issue regulations requiring the provision of information to them by the general public. Since the Agency is not involved in the issuance of such regulations, it will not be greatly affected by the Act. Further, the Act contains a number of provisions, discussed below, which will limit its effect on the Agency.

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The actual extent of the powers and duties of the Director, OMB, and their affect upon the Agency will depend upon the rules, regulations, policies and standards promulgated under Section 3504. Hence, detailed analysis of the powers and duties must await the actual promulgation of rules, etc. At the time of their promulgation, this Office, in conjunction with the Agency official appointed under Section 3506 of the Act, will review them in detail to determine their effect upon the Agency. Should you have any questions concerning a specific rule, etc., please contact this Office.

II. COLLECTION OF INFORMATION

There are two extremely important exceptions to the above-noted general rule of Agency coverage under the Act. The first is in the area of collection of information and the second is in the area of automatic data processing.

"Collection of information" is defined by Section 3502(4) as follows:

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(4) the term 'collection of information' means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods of calling for either--

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities or employees of the United States which are to be used for general statistical purposes;

As noted above, Section 3504(c) vests the Director with certain powers regarding "collection of information" by federal agencies. A reciprocal duty is imposed upon federal agencies by Section 3506. Sections 3507, 3508, 3509, 3510, 3511 and 3504(h) establish a system whereby the Director is inserted into and controls, to a certain extent, the process of a federal agency's collection of information.

Section 3518 of the Act, however, provides a number of exceptions to these provisions. Subsection (c)(1)(D) of Section 3518 provides:

(c)(1)...(T)his chapter (Chapter 35) does not apply to the collection of information

* * *

(D) during the conduct of intelligence activities as defined in section 4-206 of Executive Order 12036, issued January 24, 1978 or successor orders or during the conduct of cryptologic activities that are communications security activities.
(emphasis added)

In contrast to the language of Section 3518 (c)(1)(D), however, Section 4-206 of Executive Order 12036, in fact, does not define the term "intelligence activities." Instead, it defines the term "intelligence" and it defines that term as "foreign intelligence and counterintelligence." Given this

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ambiguity, resort may be had to the legislative history of the Act to determine what the Congress intended to be the scope of the exception created by the use of the phrase "intelligence activities."¹

When it was originally introduced as H.R. 6410, the Act did not contain this exception for "intelligence activities." The phrase was added subsequently by the Committee on Governmental Affairs of the Senate. The language of the exception was suggested by the Secretary of Defense and the Acting Director of Central Intelligence in letters to Senators Jackson and Chiles. In their letters, the Acting Director and the Secretary expressed concern that without these amendments, H.R. 6410 could have an adverse effect upon the intelligence mission and suggested that in order to avoid this, the Committee adopt amendatory language, inter alia, creating an exception for "intelligence activities."

In its report, the Committee stated as follows in regard to these concerns.

The Committee unanimously adopted every amendment recommended by the Secretary and Director. The recommended report language accurately depicts the Committee's intent behind the amendments.

^{1/} At first glance, the phrase "intelligence activities" might be thought of as encompassing those activities described by subsection (D) as "cryptologic activities that are communications security activities." Hence, the additional exclusion created for such activities by subsection (D) would appear to be surplusage. As noted in the text, however, Section 4-206 of the Executive Order does not actually define "intelligence activities;" instead, it defines "intelligence." Hence, just as in the instance of "intelligence activities," resort may be had to the Act's legislative history to determine the meaning of the phrase "cryptologic activities that are communications security activities." Resort to that history indicates that Congress, by use of that phrase, intended to create an exclusion, in addition to any other exclusion, for those activities engaged in by the National Security Agency.

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The Committee wants to make clear it intends that the Paperwork Reduction Act not affect adversely intelligence or national security missions. The recommendations of the Secretary of Defense and Director of the Central Intelligence Agency were incorporated into S. 1411 and its accompanying Committee report to ensure that the scope of the Brooks Act is not expanded and national security and intelligence missions are not adversely affected by provisions of the Paperwork Reduction Act. S. Rep. No. 96-930 19.

The Committee's actions in this regard are reflected in its amendments to the bill and in that portion of Part VII of the Report which analyzes Section 3518. S. Rep. supra, 56.

After reviewing all of the above, it is my opinion that the Congress, in using the phrase "intelligence activities" in Section 3518(c)(1)(D), intended to exclude from the requirements placed by the Act upon the "collection of information" those "collection of information" activities by agencies in the intelligence community which are related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities". This broad reading is strongly supported by the above-quoted language of the Senate Committee report. Further, nothing can be found in the legislative history which suggests Congress intended a narrower reading.² Accordingly, insofar as the Agency engages in "collection of information" activities as defined in Section 3502(4), these activities are all exempt from the restrictions otherwise imposed by the Act since they are "related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities." Further, in view of this exemption, the Agency is also exempt from those other sections of the Act which establish the information collection system and prescribe how it shall function. These sections include: Section 3504(h) (rulemaking system for rules involving collection of information); Section 3507 (Public information collection activities--submission to Director; approval and delegation); Section 3508 (Determination

^{2/} Had the Congress intended to create a narrower exception, perhaps it would have used the word "intelligence" in place of the phrase "intelligence activities."

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of necessity for information; hearing); Section 3509 (Designation of central collection agency); Section 3510 (Cooperation of agencies in making information available); and, Section 3511 (Establishment and operation of Federal Information Locator System).

It would seem, in fact, that to the extent the Agency engages in any activities involving the "collection of information," they are all "related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities" and, hence, would be exempt from the provisions of the Act. If, however, there exists a specific collection activity which you believe is not related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities, please bring it to my attention.³

III. AUTOMATIC DATA PROCESSING EQUIPMENT

As noted above, Section 3504(g) vests the Director with various powers regarding the use of automatic data processing and telecommunications equipment by federal agencies. Section 3506 imposes reciprocal duties upon federal agencies.

Section 3502(2) of the Act, however, creates an exception to these provisions as follows:

"(2) the terms 'automatic data processing,' 'automatic data processing equipment' and 'telecommunications' do not include any data processing or telecommunications system or equipment, the function, operation or use of which --

3/ Section 3512 of the Act provides that no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981 and does not display a current control number assigned by the Director or fails to state that such request is not subject to the Act. As noted above, due to the exception created by Section 3518(c)(1)(D), virtually no collection of information by the Agency would be subject to the Act. Further, to the best of my knowledge, there are no Agency forms for which a person is subject to a penalty under law for failure to complete. Hence, this provision has a negligible effect on the Agency.

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"(A) involves intelligence activities; (or)

* * *

"(E) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing or telecommunications equipment used for routine administrative and business applications such as payroll, finance, logistics and personnel management (emphasis added);

As regards subsection (2)(A), the term "intelligence activities" is not defined by the Act, and, as noted above, Executive Order 12036 defines "intelligence," not "intelligence activities." Hence, it is again appropriate to resort to the Act's legislative history in order to determine meaning of the phrase "intelligence activities" and the scope of the exclusion created thereby.

This provision was not contained in H.R. 6410 as originally introduced nor was it in the version of S. 1411 as reported to the full Senate by the Committee on Governmental Affairs. It was inserted in the bill by way of amendment on the Senate floor. At the time of the amendment's introduction, the principal sponsors, Senators Jackson and Chiles, discussed, on the Senate floor, the purpose behind the amendment. 126 Congressional Record, S. 14688 (1980).

A review of that discussion indicates that the purpose of the amendment was to create an exception to the Act's procedures for agencies in the intelligence community. This exception was created, inter alia, to safeguard information concerning this equipment from unauthorized disclosure.

Given the above, it is my opinion that in using the phrase "intelligence activities" in Section 3502(2)(A), the Congress intended to create an exception to the Act's procedures for ADP equipment, the function, operation or use of which involves activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities. This interpretation is consistent with the meaning assigned to the phrase as used in Section 3518(c)(1)(D) (discussed above in Part II) as well as with the announced Congressional intention of protecting intelligence community ADP equipment information from

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unauthorized disclosure. Accordingly, insofar as the Agency has "automatic data processing equipment, the function, operation or use of which involves activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities", that equipment and information concerning it is excluded from coverage by the Act.

It would seem that, in fact, the function, operation or use of all or substantially all of the Agency's ADP equipment involves activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities. Hence, all or substantially all of this equipment would fit within the exemption created by Section 3505(2). If, however, you have questions concerning a particular ADP system, please contact me.⁴

As regards subsection (2)(E), the exemption created thereby appears to refer to those systems and equipment which are not usually used for military or intelligence missions but which may be called upon, from time to time, to perform such missions. It provides that in such instances if the function, operation or use of the system or equipment is critical to the direct fulfillment of such a mission, then that system is exempt from the ADP provisions of the Act. While it is not clear from the language of the Act or the legislative history, it appears that this exemption was directed at "intelligence-related activities," i.e., those specialized intelligence activities conducted by offices within the Department of Defense for the collection of specialized intelligence through reconnaissance programs. Cf. Executive Order 12036, Section 1-1203. In any

4/ Despite the above conclusion, the Agency remains subject to the Federal Information Processing Standards Publications (FIPS PUBS) for ADP equipment which are promulgated by the Department of Commerce pursuant to the Section 111 of the Federal Property and Administrative Services Act, 40 U.S.C. §759, referred to as the Brooks Act, and to Executive Order 11717. The Paperwork Reduction Act contains a number of provisions which make it clear that the passage of that Act in no way affected the provisions of the Brooks Act. This conclusion is also supported by extensive portions of the legislative history of the Paperwork Reduction Act. I also note that the Act does not increase or decrease the authority of the Director, OMB in this area. ()

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event, however, as noted above, all Agency ADP is, in fact, used for "intelligence activities" and thus would fall within the exception created by subsection (2)(A). Hence, no resort to subsection (2)(E) would be required.

IV. DESIGNATION OF SENIOR AGENCY OFFICIAL FOR COMPLIANCE

Subsection (b) of Section 3506 provides that the head of each agency shall designate, no later than July 1, 1981 (three months after the Act's effective date of April 1, 1981), a senior official to carry out the agency's responsibilities under the Act. This official must report directly to the agency head and, if the agency has received a delegation of authority under Section 111 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §759, known as the Brooks Act, the official must be responsible for acquisitions made under that delegation.

Accordingly, no later than July 1, 1981, the Director of Central Intelligence must appoint an Agency employee to assume the duties established by Section 3506(b). Further, as you know, the Agency currently is operating under a Brooks Act delegation from the General Services Administration. This delegation was made to the Director and he, in turn, delegated it to Director, Office of Logistics. Accordingly, in making his appointment, the Director of Central Intelligence either must appoint Director, Office of Logistics, to the position or, if he chooses to appoint another individual, he must simultaneously reassign responsibility for the Brooks Act delegation to that individual. The Director of Central Intelligence is being advised of this by separate memorandum.

V. PARTICULAR AGENCY DUTIES

As noted above, the actual scope of Agency duties under the Act will depend upon the substance of the rules promulgated by the Director, OMB. Section 3506, however, imposes several duties upon the Agency independent of any promulgations by the Director, OMB. Those are: to systematically inventory its major information systems; to periodically review its information management activities, including planning, budgeting, organizing, directing, training, promoting, controlling and other activities involving the use and dissemination of information;⁵ to ensure

^{5/} These duties are also imposed in regard to the collection of information. The Agency is not subject to this aspect of these duties, however, due to the exception created by Section 3518(c)(1)(D). See Part II, above.

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information systems do not overlap; and, to develop procedures for assessing the paperwork and reporting burden of proposed legislation affecting the Agency.

These requirements seem to be consistent with sound management practices and would appear to impose little in the way of additional administrative burden. Further it would seem that the Agency already may have procedures which could be viewed as meeting these obligations. In order to determine what, if anything, additionally needs to be done under this Section, however, I would ask that each addressee provide this Office with information concerning what current procedures of his office could be said to meet these obligations. We will then proceed, in conjunction with the official appointed under Section 3506(b), to determine what, if any, additional steps need to be taken.

VI. AGENCY EVALUATION

Section 3504(b)(5) of the Act vests the Director with the power to evaluate "agency information management practices to determine their adequacy and efficiency, and to determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director." Subsection (a) of Section 3504 provides, however, that the Director's authority under Section 3504 shall be exercised consistent with applicable law." Hence, as noted in the Introduction, in exercising this authority vis a vis the Agency, the Director must do so in a manner which is consistent with the statutory responsibility of the Director of Central Intelligence to protect sources and methods of intelligence.

There are two other sections of the Act, Sections 3513 and 3505, which expand upon the basic authority contained in Section 3504(b)(5).

As part of his evaluation authority, Section 3513 of the Act vests the Director, OMB, with the power and duty to selectively review, at least once every three years, the information management activities of each agency to ascertain their adequacy and efficiency with particular regard to compliance with Section 3506. It further states that the results of these reviews shall be provided to the Congress and, thereafter, that the agency involved shall transmit to the Congress a response to that report.

Section 3505(2)(A) of the Act limits Section 3513 by providing that the Director, OMB, may not assign the responsibility for the such reviews done in regard to major

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information systems used for the conduct of "intelligence activities" as defined in Section 4-206 of Executive Order 12036. Again, as in Sections 3518(c)(1)(D) and Section 3502(2)(A), the phrase "intelligence activities" is used and, again, as in those sections, the phrase does not coincide with a term actually defined in Executive Order 12036.

It is my opinion that the phrase "intelligence activities" may be interpreted as meaning "activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities". This interpretation is consistent with the meaning assigned to the phrase as used in Sections 3518 (c) (1) (D) and 3502 (2) (A) (see Parts II and III above) and is strongly supported in the legislative history of the Act. Hence, the caveat regarding assignability which is set forth in Section 3505 (2) (A) applies to major information systems used for the conduct of activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities.

In fact, all or substantially all of the Agency's systems would seem to be used for the conduct of activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities. Accordingly, reading Section 3513 with Section 3505 (2) (A), it is my opinion that while the Director, OMB, may conduct a selective review of the Agency's systems, the actual conduct of that review may not be assigned to another agency. S. Rep. No. 96-930 19, 20, 24. Hence, for example, the Director, OMB could not assign the review responsibility to the General Accounting Office.⁶

6/ It should also be noted that under Section 3519 of the Act and the Budget and Accounting Act of 1921, as amended by the General Accounting Office Act of 1980, P.L. 96-226, the Director, OMB, would be precluded from releasing Agency information, gained in the course of a review under Section 3513, to the General Accounting Office in an audit, by that office, of the OMB.

I also note the following in regard to the exercise of this review power. Since this selective review is an exercise of the Director's more general power, contained in Section 3504, to evaluate agency practices, it is therefore subject to the condition, placed upon the exercise of that power by subsection (a) of Section 3504, that it be exercised consistent with applicable laws. The "applicable law," in the instance of a selective review, would be the aforementioned statutory duty of the Director to protect sources and methods. Further, as regards the provision of the results of the review to Congress as called for by subsection (b) of Section 3515, an additional "applicable law" would be Senate Resolution 400 (94th Congress) and House Resolution 658 (95th Congress), which, inter alia, establish a special relationship between the Agency and its Congressional oversight committee. Hence, the provision of the results of this review to Congress would have to be in a manner consistent with these resolutions. At the time this Agency is made the subject of an evaluation or selective review, this Office will work with the OMB to insure the review is conducted in the manner consistent with these provisions.

I hope that the above will answer all questions you may have concerning the Act. I look forward to receiving your responses in regard to Part V. Should you have any questions, feel free to contact me

Daniel B. Silver